No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held—in conflict with this Court's decision in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), decisions of other federal circuits, and the clear intent of Congress—that the National Collegiate Athletic Association, a private organization that does not itself receive federal financial assistance, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, because it receives payments from entities that do.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The National Collegiate Athletic Association ("NCAA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 139 F.3d 180 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Western District of Pennsylvania is reported at 978 F. Supp. 213 and reprinted at App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1998. App. 37a-38a. Both parties filed timely petitions for rehearing and suggestions for rehearing in

banc, which were denied on April 20, 1998. *Id.* 39a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681(a), provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Pertinent provisions of Title IX, the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, are reprinted at App. 41a-47a. Pertinent regulations are reprinted at *id.* 47a-50a.

INTRODUCTION

This case concerns the reach of Title IX to private entities or programs that do not themselves receive federal financial aid. Title IX by its terms covers programs or activities "receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 610 (1986), this Court held that "Title IX"—like the other program-specific statutes with the same federal-funding trigger—"draws the line of federal regulatory coverage between the recipient and the beneficiary."[1] It

[1] In addition to Title IX, the program-specific statutes include Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d (emphasis added), which prohibits discrimination against persons on the basis of race, color, or national origin in "any program or activity *receiving Federal financial assistance*," and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (emphasis added), which prohibits discrimination against handicapped persons in "any program or activity *receiving Federal financial assistance*." As explained below, this Court has recognized that these laws are modeled on Title VI, and that the identical language in these laws was intended to be given the same meaning.

"covers those who *receive* the aid, but does not extend as far as those who *benefit* from it." *Id.* at 607 (emphasis added). The "key," then, in gauging Title IX's applicability, is to determine whether a program or entity is a "recipient" of federal aid. *Id.*

The NCAA—a private association of the Nation's colleges and universities—does not receive federal financial aid. Most of its member institutions, on the other hand, do. The Court of Appeals below held that the NCAA is covered by Title IX because "the NCAA receives dues"—accounting for a tiny fraction of its annual operating revenues—"from its members which receive federal funds." App. 16a. That ruling directly conflicts with this Court's decision in *Paralyzed Veterans*, the decisions of other federal circuits on the reach of Title IX and the other program-specific statutes to private entities (including the NCAA), and the clear intent of Congress in enacting these statutes to limit coverage "to those who *actually* 'receive' federal financial assistance." 477 U.S. at 605 (emphasis added). This Court should grant certiorari to resolve the multiple conflicts on the important question presented.

STATEMENT OF THE CASE

The NCAA is a voluntary, unincorporated association of some 1200 members, consisting primarily of public and independent colleges and universities across the country. The NCAA does not receive federal financial assistance—whether in the form of grants, loans, or participation in other federal aid programs—and, instead, funds its activities through the receipt each year of approximately $200 million in revenues from television royalties, championship events, and various sales and services. The NCAA also collects about $900,000 annually in dues from its member institutions, which account for less than one percent of the NCAA's total annual operating revenues. In

contrast to the NCAA, most NCAA member institutions receive federal financial assistance in the form of grants, loans, or participation in various federal programs.[2]

Formed in 1906 in response to public outcry over the state of intercollegiate athletics, "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984). Toward this end, the NCAA adopts and helps to enforce rules governing athletic events, academic eligibility, recruitment, admissions, financial aid, and size of athletic squads and coaching staffs. When colleges and universities join the NCAA, they agree to abide by these rules. This case arises because of the NCAA's enforcement of one of these rules—NCAA Bylaw 14.1.8—which prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which she received her undergraduate degree. *See* App. 3a-4a & n.2.

Respondent Renee M. Smith ("Smith") played intercollegiate volleyball for St. Bonaventure University during the 1991-92 and 1992-93 athletic seasons. She elected not to play during the 1993-94 season, and graduated early from St. Bonaventure (in two and a half years). Smith then entered a postgraduate program at Hofstra University and, in 1995, enrolled in another postgraduate program at the University of Pittsburgh. The NCAA denied Smith eligibility to play intercollegiate volleyball for Hofstra during the 1994-95 season, and for the University of Pittsburgh during the 1995-96 season, pursuant to Bylaw 14.1.8. Smith thereupon brought the instant

[2] Colleges and universities are eligible to participate in a number of federal grant and other programs, including those covering student loans, construction and maintenance of education facilities, and faculty training and development. *See* 34 C.F.R. pt. 100, App. A (listing statutory programs).

action in the United States District Court for the Western District of Pennsylvania, alleging that the NCAA had violated Title IX and certain other laws by refusing to grant her a waiver from Bylaw 14.1.8. *See* App. 3a-4a.[3]

The NCAA moved to dismiss on the ground that Title IX covers only programs or entities "receiving Federal financial assistance," 20 U.S.C. § 1681(a), and Smith failed adequately to allege that the NCAA receives such assistance. Moreover, even if the complaint were sufficient, the NCAA argued, Smith could not establish that the NCAA receives any federal financial assistance that, as a matter of law, would render it subject to Title IX. In response, Smith argued that the allegations were sufficient, and that the NCAA is subject to Title IX because its *member institutions* receive federal funding and, " 'although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.' " App. 30a (quoting Pl's Br. 6).

The District Court (Ambrose, J.) dismissed Smith's complaint for failure to state a claim upon which relief could be granted. *Id.* 33a. The court agreed with the NCAA that Smith had failed adequately to allege that the NCAA is a recipient of federal financial assistance. *Id.* 31a. It further held that Smith "has failed to state a claim under Title IX," even assuming the NCAA's member institutions receive federal funds and such "funding may ultimately be paid from the member institution[s]

[3] Smith also alleged that NCAA Bylaw 14.1.8 unreasonably restrains trade and has an adverse effect on competition in violation of the Sherman Act, 15 U.S.C. § 1. The Court of Appeals affirmed dismissal of this claim, *see* App. 5a-12a, and it is not at issue here. In addition, Smith brought a state law breach of contract claim; the District Court, however, declined to exercise supplemental jurisdiction over that claim after dismissing the federal counts. That ruling is also not at issue here. *Id.* 34a. This petition is addressed solely to Smith's Title IX claim.

to the NCAA in membership dues or other fees." *Id.* 32a. Such a " 'connection[]' with federal funding," the court explained, is "too far attenuated to qualify [the NCAA] as a recipient of federal funds thus subjected to the mandates of Title IX." *Id.*

Shortly after the District Court entered its order dismissing Smith's Title IX claim, Smith sought leave to amend her complaint to allege that " '[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " *Id.* 18a (quoting amended complaint). Having already concluded that the "connection" by which Smith sought to prove that the NCAA was an indirect recipient of federal funds was too attenuated as a matter of law to trigger Title IX, the District Court denied Smith's request, *id.* 36a, and she appealed.

The Third Circuit reinstated Smith's Title IX claim. According to the Court of Appeals, the District Court should have allowed Smith's Title IX claim to proceed on the basis of her proposed amendment because it "alleges that the NCAA receives dues from member institutions, which receive federal funds." *Id.* 19a. "[T]his allegation," the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.*

In so holding, the Court of Appeals recognized that this Court in *United States Department of Transportation* v. *Paralyzed Veterans of America, supra,* held that Section 504 does *not* extend to entities which simply benefit from—as opposed to receive—federal financial assistance, and further acknowledged that Section 504 "contains language *identical* to that of Title IX * * * regarding receipt of federal assistance." App. 14a (emphasis

added).[4] "Notwithstanding the parallel language of [Section 504] and Title IX," however, the Court of Appeals chose "not [to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX." App. 15a. The sole reason that the court gave for departing from *Paralyzed Veterans* was that an administrative regulation under Title IX "defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in Court of Appeals opinion). That regulation, the court held, "require[d]" it to "reach a different result." *Id.*

Based on this reasoning, the Court of Appeals held that the fact "that the NCAA receives dues from its members which receive federal funds * * * would subject the NCAA to the requirements of Title IX," and thus ruled that Smith's Title IX claim was entitled to proceed. *Id.* 16a. The NCAA filed a timely petition for rehearing and suggestion for rehearing in banc, which was denied on April 20, 1998. *Id.* 39a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *PARALYZED VETERANS.*

One of the principal considerations governing the exercise of this Court's certiorari jurisdiction is whether a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Third Circuit decision in this case directly conflicts with this Court's decision in

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[4] Title IX and Section 504—enacted one year after Title IX—were both modeled on Title VI, which, as noted, contains the identical funding-based trigger. *See* note 1, *supra*; *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 66 U.S.L.W. 4501, 4505 (U.S. June 22, 1998); *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-696 & n.16 (1979) (recounting legislative history of Title IX).

Paralyzed Veterans. Indeed, while the broad significance of this case calls for plenary review, the Third Circuit decision is so clearly contrary to *Paralyzed Veterans* as to warrant summary reversal.

The question in *Paralyzed Veterans* was whether Section 504 of the Rehabilitation Act—which prohibits discrimination against handicapped persons in any program or activity "receiving Federal financial assistance," 29 U.S.C. § 794—applies to commercial airlines. Airlines do not receive federal aid, but airport operators do. 477 U.S. at 604-605. In arguing that Section 504 covers airlines, the plaintiffs in *Paralyzed Veterans* reasoned that "airlines are 'indirect recipients' of the aid to airports," because "airport operators convert the [aid] into runways and give the federal assistance—now in the form of a runway—to the airlines." *Id.* at 606. This Court disagreed, holding that "Section 504, *like Title IX* * * *, draws the line of federal regulatory coverage between the recipient and the beneficiary," and that Section 504 accordingly "covers those who receive the aid, but does *not* extend as far as those who benefit from it." *Id.* at 607, 610 (emphases added).

The Third Circuit decision below clearly conflicts with *Paralyzed Veterans.* As the Supreme Court itself recognized in *Paralyzed Veterans*, Title IX and Section 504 contain the identical federal-funding trigger, and were intended to be given the same meaning. *Id.* at 610. Like the airlines in *Paralyzed Veterans*, the NCAA does not itself receive federal financial aid, and—at most—only indirectly benefits from the federal aid received by its member institutions in the form of dues paid by members to the NCAA. Thus, under the rule of *Paralyzed Veterans*, the NCAA is not a recipient of federal financial assistance, but rather—at most—an indirect beneficiary beyond Title IX's reach. The Third Circuit's contrary conclusion violates the central teaching of *Paralyzed Veterans*: that federal coverage under the program-specific

statutes does not "follow[] the aid past the recipient to those who merely benefit from the aid." *Id.* at 607.

Indeed, the conclusion that federal regulatory coverage is not triggered is even clearer here than in *Paralyzed Veterans.* There can be no serious question that the airlines in *Paralyzed Veterans* benefit from the federal aid received by airports; that aid is used to build the runways on which airlines land and to operate the air traffic control system that guides them in. Here, by contrast, it is by no means evident that the NCAA even benefits from the federal aid to colleges and universities. Indeed, as Smith herself acknowledges, there is no guarantee that this aid—earmarked for specific purposes other than the NCAA or its mission—will ultimately find its way to the NCAA in the form of dues. *See* App. 30a (quoting Pl's Br. 6). Even if it does, those dues account for only a tiny fraction (less than one percent) of the NCAA's annual operating revenues.[5]

The linchpin of the Supreme Court's analysis in *Paralyzed Veterans* underscores the conflict with the Third Circuit decision below. In rejecting the indirect beneficiary analysis, the *Paralyzed Veterans* Court recognized that Congress intended coverage under the program-specific statutes to be premised on the contract between the government and the actual aid recipient. As Justice Powell wrote for the Court, "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the non-discrimination pro-

[5] Because the NCAA does not dispute that "[it] receives dues from its members which receive federal funds," App. 16a—the sole predicate for the Third Circuit ruling that the NCAA may be subjected to Title IX—this case presents a good vehicle for deciding the important question presented, which, as we explain below, has serious implications for numerous organizations in addition to the NCAA. *See* Part III, *infra*.

vision." 477 U.S. at 605. That is a "*quid pro quo* for the receipt of federal funds." *Id.* (quotation omitted). The rationale applied by the Third Circuit below disregards this important contractual limitation on Title IX's reach—which this Court expressly reaffirmed just last Term in *Gebser* v. *Lago Vista Independent School District*, 66 U.S.L.W. at 4505—and, instead, gives the statute "almost limitless coverage," "a result Congress surely did not intend." 477 U.S. at 608, 609.[6]

Although the Third Circuit recognized that Title IX contains the identical trigger as Section 504, it chose "not

[6] This contractual analysis is not only analytically superior to the limitless indirect beneficiary rationale adopted by the Third Circuit to extend Title IX to the NCAA, but is dictated by the nature of the legislation at issue. Like the statute on which they were modeled (Title VI), Title IX and Section 504 were enacted pursuant to the Spending Clause. *See Lago Vista*, 66 U.S.L.W. at 4505; *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 598-599 (1983). In exercising its spending power, Congress is free to attach conditions to the receipt of funding so long as it does so in clear terms. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Extending Title IX beyond the actual recipients that are in a position to accept or reject such conditions—and that in fact are given notice of such conditions—would give the statute unintended and unsupportable breadth.

"Title IX's contractual nature" was the underpinning for this Court's decision in *Lago Vista*, holding that a school district may not be held liable under Title IX for the acts of its teachers unless it "has actual notice of * * * the teacher's misconduct." 66 U.S.L.W. at 4502, 4505. In so holding, the Court emphasized that Title IX "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds," and that this "contractual framework" prohibits a court from imposing liability where "the receiving entity of federal funds [lacks] notice that it will be liable for a monetary award" for the acts in question. *Id.* (quotation omitted). The Third Circuit did not have the benefit of *Lago Vista* when it decided this case, but it follows *a fortiori* that if Title IX does not cover the acts of a federal funding recipient's own employees in the circumstances of *Lago Vista*, then Title IX does not extend to an entity—such as the NCAA—that is not a federal funding recipient in the first place.

[to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX" because it believed that an administrative regulation under Title IX compelled a different result. App. 15a. As the Court of Appeals put it, "the broad regulatory language under Title IX * * * defines a recipient as an entity 'which operates an educational program or activity which *receives or benefits*' from federal funds." *Id.* (quoting 34 C.F.R. § 106.2(h)) (emphasis in opinion). *But the Court of Appeals omitted the pertinent and critical part of the regulatory definition*—the clause immediately preceding the one it quoted in explaining its refusal to follow the Supreme Court's opinion in *Paralyzed Veterans*. In full, the regulation defines "recipient" to include

> any public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient *and* which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. [34 C.F.R. § 106.2(h) (emphasis added).]

Contrary to the supposition of the Court of Appeals, it is not enough—even under the regulatory definition upon which the Third Circuit relied to go beyond *Paralyzed Veterans*—that an entity "operates an educational program or activity which receives or benefits" from federal funds for that entity to be a covered recipient under Title IX. *Id.* Instead, as the italicized "and" in the quoted text above unambiguously confirms, the entity itself must *also* be one "to whom Federal financial assistance is extended directly or through another recipient." *Id.* That of course is the issue in this case, and that issue is controlled by this Court's decision in *Paralyzed Veterans*.[7]

[7] The Third Circuit's reading of the Title IX regulation is flawed in another respect: as this Court has made clear on two separate occasions, the specific language upon which the Court of Appeals

The fact that the regulation notes that the recipient of federal funds may be "through another recipient" simply reflects this Court's decision in *Grove City College* v. *Bell*, *supra*, where the Court held that a college may be covered by Title IX by virtue its students' receipt of federal tuition grants. That holding, however, was explicitly based on the "powerful evidence of Congress' intent" that colleges are in fact an *intended* recipient of the federal aid in question. 465 U.S. at 569; *see id.* at 565-570 (reviewing legislative record). In other words, *Grove City* stands for the proposition that an indirect *recipient* may be covered by Title IX where it is clear that Congress itself viewed that entity as a recipient of the financial aid. It does not stand for the proposition that a mere beneficiary is covered—the proposition this Court expressly rejected in *Paralyzed Veterans*. *Grove City* thus lends no support to the Third Circuit decision in this case, where there is absolutely no indication (or allegation) that the NCAA is an intended recipient of the federal aid received by colleges or universities, and in fact that aid is earmarked for purposes *other than* NCAA dues.

This Court confirmed this reading of *Grove City* in *Paralyzed Veterans*, when it rejected the same basic argu-

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relied to go *beyond* the rule of *Paralyzed Veterans* was included to serve a *limiting* function required by Title IX—*i.e.*, to "conform [the regulation] with the [program-specific] limitations Congress enacted in §§ 901 and 902." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539 (1982); *accord Grove City College* v. *Bell*, 465 U.S. 555, 574 (1984). In 1988 Congress broadened the scope of Title IX to apply institution wide, *see* Civil Rights Restoration Act of 1987 ("CRRA"), 20 U.S.C. § 1687, but it left undisturbed the existing funding trigger—as interpreted by *Paralyzed Veterans*. *See* S. Rep. No. 100-64, at 29 (1987) (CRRA "does not alter what is defined as 'federal financial assistance,'" as that term has been construed under Title IX, Title VI, and Section 504, and "does not overrule or alter the Supreme Court ruling in [*Paralyzed Veterans*]."); 55 Fed. Reg. 52136, 52138 (Dec. 19, 1990) (same).

ment—also based on *Grove City*—made by the plaintiffs in *Paralyzed Veterans*:

> [Plaintiffs] also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. * * * While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. [*Paralyzed Veterans*, 477 U.S. at 606-607 (emphasis in original).]

The "proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid," *id.* at 607—flatly rejected by this Court in *Paralyzed Veterans*—is precisely the principle that the Third Circuit adopted and applied in this case to extend Title IX to the NCAA.[8]

The result of the Third Circuit's abrupt dismissal of *Paralyzed Veterans* and truncated reading of the regulation is the very vice that the Supreme Court sought to avoid in *Paralyzed Veterans*: the decision gives the statu-

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[8] This interpretation conflicts with Congress' intent in enacting the federal-funding trigger for the program-specific statutes. As one commentator has recounted, in drafting Title VI Congress initially contemplated conditioning coverage on the receipt of "'direct *or indirect* financial assistance.'" Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof"*, 78 Mich. L. Rev. 608, 614 (1980) (quoting legislative record; emphasis added). But the reference to "indirect" assistance was later deleted from the draft bill. *Id.* at 614-615. As this Court recognized in *Cannon*, 441 U.S. at 696, and reaffirmed in *Lago Vista*, 66 U.S.L.W. at 4505, Title IX was modeled on Title VI and was intended to be interpreted the same way. And, of course, in construing these statutes, a court must be "directed by [the statutes'] words, and not by the discarded draft." *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993).

tory program "almost limitless coverage," 477 U.S. at 608, eliminating the "contractual" backstop that Congress erected in enacting Title IX to ensure that only actual recipients of federal aid would be covered. *Id.* at 605. Thus, the Third Circuit's reasoning would, on its face, extend Title IX and the other program-specific laws to practically *any* entity which receives payments from a college or university that, in turn, receives federal financial assistance. The company that manufactures the test tubes used in the laboratory, the athletic equipment or apparel manufacturer, the facilities maintenance contractor, the firm that sells the ink used for the college catalogue—all of these would be covered "recipients" under the Third Circuit's logic, though plainly none of them was intended to be reached by Congress.[9]

The Third Circuit's singular reliance on the regulatory definition of recipient conflicts with this Court's decisions in another important respect. As the Third Circuit explained, it declined to apply the rule of *Paralyzed Veterans* because, in its view, doing so would render the Title IX regulation a "nullity." App. 16a. Regulations fall if they are inconsistent with Supreme Court precedent, however, not the other way around. In *Paralyzed Veterans*, the Court construed what the Third Circuit itself called statutory "language identical to that of Title IX." App. 14a. Once the Court had done so, no agency was free to prescribe an alternative view of the meaning of that statutory language in regulations. As a unanimous Court recently explained, "[o]nce we have determined a statute's

[9] The Third Circuit decision also leads to absurd results in the area of enforcement. As this Court has recognized, "[t]he ultimate sanction for noncompliance [with Title IX] is termination of federal funds or denial of future grants." *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 514-515 (footnote omitted). It is unclear how such measures could be taken against an entity, such as the NCAA, which neither receives nor seeks federal funds and, at most, benefits only tangentially from receipt of such funds by separate entities.

meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal* v. *United States*, 516 U.S. 284, 295 (1996) (citing cases). Thus, even assuming the Third Circuit properly construed the regulation, the result it reached is still irreconcilable with *Paralyzed Veterans* and this Court's precedents.[10]

Since *Paralyzed Veterans*, affected agencies have amended their Section 504 regulations to "delete[] the phrase 'or benefiting from' [federal financial assistance]," explaining that this change was required by *Paralyzed Veterans*, "which held that air transportation services provided by airlines were not part of the covered program or activity because the airlines were not the intended recipient of the Federal financial assistance to airports, even if airlines benefited from that assistance." 55 Fed. Reg. at 52138. The "or benefits from" language has yet to be deleted from 34 C.F.R. § 106.2(h), but it was error for the Third Circuit to give effect to that language in an effort to bypass this Court's interpretation in *Paralyzed Veterans*, which—as this Court made explicit in *Paralyzed Veterans*—applies with equal force to Title IX.

II. THE THIRD CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS.

The conflict does not end with *Paralyzed Veterans*. The Third Circuit decision below also conflicts with decisions of other federal circuits on the reach of the pro-

[10] While the Court in *Paralyzed Veterans* did not address the Title IX regulations, it made clear that its construction of the operative funding language in Section 504 applied to each of the program-specific statutes, including Title IX. *See* 477 U.S. at 605. And, when *Paralyzed Veterans* was decided, the same regulation on which the Third Circuit grounded its decision in this case was in existence, yet did not deter this Court from its ruling. *See* 34 C.F.R. § 106.2(h) (1986).

gram-specific statutes, providing an alternative basis for certiorari. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"). The volume of case law in the federal courts of appeals on the application of the program-specific statutes to entities or individuals that are not themselves recipients of federal funds underscores the recurring nature and importance of the basic question presented.

To begin with, the Third Circuit's refusal to follow this Court's interpretation of Section 504's federal-funding trigger in *Paralyzed Veterans* conflicts with decisions of other circuits expressly recognizing that Congress intended the parallel language in Title IX, Section 504, and Title VI to be given the same meaning. *See, e.g., Doe* v. *Attorney General of United States*, 941 F.2d 780, 794 (9th Cir. 1991) ("Congress originally patterned section 504 after Title VI of the Civil Rights Act of 1964 and Title IX * * * and assumed enforcement for each would be the *same*.") (footnote omitted; emphasis added) (citing legislative materials); *United States* v. *Alabama*, 828 F.2d 1532, 1548 n.63 (11th Cir. 1987) ("Title IX * * * and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the *same* for all three statutes.") (emphasis added) (citing Supreme Court precedent), *cert. denied*, 487 U.S. 1210 (1988); *Foss* v. *City of Chicago*, 817 F.2d 34, 36 n.1 (7th Cir. 1987) (same).

As the Ninth Circuit explained in *Doe*, "[t]he pattern was to provide that no person could 'be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity *receiving Federal financial assistance*,' whether on the basis of handicap in section 504, sex in Title IX, or race in Title VI." 941 F.2d at 794 n.20 (emphasis added). The Third Circuit decision in this case self-consciously extends the reach of Title IX far beyond that of Section 504 and Title VI—to cover indirect beneficiaries of federal assistance, such as the NCAA, that do not themselves receive federal aid—in direct conflict with these court of appeals decisions, not to mention *Paralyzed Veterans* and the clear intent of Congress to limit *each* of the program-specific statutes with the identical funding trigger "to those who *actually* 'receive' federal financial assistance." 477 U.S. at 605 (emphasis added).

Not surprisingly, the Third Circuit decision also conflicts with decisions of other circuits faithful to *Paralyzed Veterans*. Thus, for example, in *Grzan* v. *Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119-120 (7th Cir. 1997), the Seventh Circuit held that Section 504 does not cover employees of a direct recipient of federal aid, even though they receive payments—in the form of wages—from a federal funding recipient. In reaching this result, the Seventh Circuit specifically relied upon *Paralyzed Veterans* for the proposition that "benefiting from a federally financed program, *even where the benefits are financial*, does not necessarily constitute the receipt of federal funding." *Id.* at 120 (emphasis added). As the Fourth Circuit observed in rejecting a similarly far-fetched claim, if the program specific statutes extended to "such indirect beneficiaries of federal largesse, consistency would demand that [they] apply to every customer of every enterprise subsidized by the federal government." *Disabled in Action* v. *Mayor & City Council*, 685 F.2d 881, 884-885 (4th Cir. 1982).

The decision below is also at odds with *Gallagher* v. *Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996). The plaintiff in that case argued that a bank was subject to Section 504 because, although not a direct recipient of federal financial assistance, the bank "makes student loans which are subsidized and guaranteed with federal funds." *Id.* at 277. Following *Paralyzed Veterans*, the Sixth Cir-

cuit affirmed the dismissal of this claim on the ground that the bank was not covered by Section 504. As the court explained, federal coverage "does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement." *Id.* at 278 (quotation omitted). *But see Moore* v. *Sun Bank*, 923 F.2d 1423, 1432 (11th Cir. 1991) (holding that banks receiving federal default reimbursements on loans guaranteed by the Small Business Administration are covered by Section 504).[11]

The Third Circuit decision also conflicts with decisions involving the third-party liability of actual federal funding recipients. For example, in *Rowinsky* v. *Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996), the Fifth Circuit held that a public school may not be held liable under Title IX for

11 *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996), illustrates the circumstances in which the indirect receipt of federal aid may trigger coverage. In that case, the Sixth Circuit held that a railroad was subject to Section 504, where the railroad "receives government money for the improvement of railroad crossings," which it then "owns." *Id.* at 786-787. The railroad argued that federal law was not triggered under *Paralyzed Veterans* because, pursuant to the federal program at issue, funds are distributed first to the states and then to railroads. *Id.* at 787. But the Sixth Circuit disagreed, explaining that railroads were plainly the intended recipients of the federal funds and, like direct recipients, were required to execute "an express promise to comply with the nondiscrimination regulations for federally assisted programs." *Id.* In this case, by contrast, the NCAA is plainly not the intended recipient of the federal aid paid to member institutions—earmarked for specific purposes other than the NCAA, such as student aid and scientific research. *Cf. Bentley* v. *Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (county's receipt of federal funds from state government triggered Section 504); *Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) ("An entity has been held to be an 'indirect recipient' only where that entity received funding that was funneled from the federal government through the state") (quoting *Paralyzed Veterans*, 477 U.S. at 609).

the acts of others absent allegations that the school itself engaged in acts of discrimination. Central to the court of appeals' ruling was its determination—based on an extensive review of the legislative record of Title IX—that "title IX makes funds available to a recipient in return for the *recipient's* adherence to the conditions of the grant," and that, as a result, "the spending conditions apply *only* to grant recipients." *Id.* at 1012-13 (emphasis added).[12] *See also Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1018 (7th Cir. 1997) ("only a grant recipient can violate Title IX"), *cert. denied*, 66 U.S.L.W. 3814 (U.S. June 26, 1998).

These decisions are true to *Paralyzed Veterans'* contractual analysis governing the reach of Title IX, and stand on even firmer footing in light of this Court's decision last Term in *Gebser* v. *Lago Vista Independent School District*, 66 U.S.L.W. at 4502, 4505, holding that a school district receiving federal funds may not be held liable under Title IX's "contractual framework" for the misconduct of its employees unless it has "actual notice of, and

12 *Rowinsky* clarifies the Fifth Circuit position on the reach of the program-specific statutes in the wake of *Paralyzed Veterans*. In *Frazier* v. *Board of Trustees*, 765 F.2d 1278, 1289-90 (5th Cir. 1985) (emphasis in original), the court of appeals had held that a private contractor hired by a hospital receiving Medicaid and Medicare funds was covered by Section 504, where the contractor's "revenue was *in fact* linked to the hospital's receipt of [federal] funds," in that the contractor was required to "recompense [the hospital] in the event that 'third-party payors' disallowed any of the hospital's claims for reimbursement based on services rendered by [the contractor]." That ruling is dubious under *Paralyzed Veterans*, which was decided a year after *Frazier*. But even the *Frazier* court emphasized that "we do not hold that independent contractors who perform services for recipients of federal funds become recipients by virtue of a vicarious relationship through the primary recipient." *Id.* at 1290 n.29. In this case, there is no allegation that the NCAA's receipt of membership dues is in fact linked to its members' receipt of federal funds, and it is not. Instead, the allegations at most show the type of "vicarious relationship" held to be insufficient in *Frazier*.

is deliberately indifferent to, the * * * misconduct," and thus is effectively complicit in it. *See* note 6, *supra*. Applying these circuit decisions (and *Lago Vista*) here results in the conclusion that only colleges and universities that are in fact grant recipients are covered by Title IX—not the NCAA, which receives no federal aid and, accordingly, has never entered into the "contract between the Government and the recipient of funds" that is the central prerequisite for Title IX coverage to attach. *Lago Vista*, 66 U.S.L.W. at 4505.

Significantly, the Third Circuit decision also conflicts with *NCAA* v. *Califano*, 622 F.2d 1382 (10th Cir. 1980), on the particular issue of Title IX's application to the NCAA. That case involved a challenge brought by the NCAA to regulations promulgated under Title IX. The government moved to dismiss, arguing that the NCAA—not being a federal funding recipient—lacked standing to challenge the Title IX regulations. The district court agreed, explaining that the "administrative provisions in question exert no direct regulatory effect upon the NCAA" because the NCAA "receives no federal financial assistance," and the regulations—like the statute itself—"apply only to 'recipients' of federal financial assistance." 444 F. Supp. 425, 430-431 (D. Kan. 1978). The Tenth Circuit embraced that same view, reiterating that the Title IX "regulations can only be read to apply to the member colleges and *not to the NCAA itself*." 622 F.2d at 1387 (emphasis added). The Third Circuit below not only held that the NCAA *is* subject to Title IX, but did so in derogation of this Court's decision in *Paralyzed Veterans*, on the basis of the very Title IX regulations that the Tenth Circuit held were inapplicable to the NCAA.

Without coming to terms with the foregoing authorities, the Third Circuit sought to draw support for its ruling from *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994), which applied Title IX to a state high school athletic association. The athletic association in *Horner* was designated by state law as "'agent'" of the state board of education "'to manage interscholastic athletics at the high school level * * *,'" and the state board of education, in turn, exercised control over educational programs receiving hundreds of millions of dollars in federal funds. *Id.* at 268-269 (quoting state law). The athletic association also received dues from schools receiving federal funds. In holding that the association was subject to Title IX the Sixth Circuit pointed to the dues, but emphasized that "[t]he *most persuasive* evidence of the [association]'s status as a recipient is the fact that its functions are statutorily decreed to be those of the Board"—a federal funding recipient. *Id.* at 272 (emphasis added). As the District Court below held, in the absence of any comparable statutory connection between the NCAA and its members here—and there is none—*Horner* provides no justification for extending Title IX to the NCAA. *See* App. 33a.[13]

In any event, to the extent *Horner* supports Smith's Title IX claim it, too, goes beyond this Court's interpretation of the federal-funding trigger in *Paralyzed Veterans*, and simply underscores the conflict and confusion on the

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[13] In following *Horner*, the Third Circuit stated that—while there is no statutory connection between the NCAA and its members—the NCAA nevertheless acts as a "surrogate[]" for its members. *Id.* 14a. That reflects a fundamental misunderstanding of the NCAA. While there is of course some overlap between the missions of the NCAA and its members, in adopting rules and regulations the NCAA acts foremost with *its* special mission in mind—"maintenance of [the] revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. While apparently lost upon the Third Circuit, this fact was not lost upon the courts in *Califano* in concluding that the NCAA is not within Title IX's regulatory reach. *See Califano*, 444 F. Supp. at 433 ("[The NCAA] does not profess to represent its members' interests either in the promotion of intercollegiate athletic programs for women or in general physical education activities for members of either sex," and "[t]he NCAA's interests are * * * not coterminous with or identical to the broader interests of all or any of its institutional members.").

reach of Title IX to entities—including athletic associations—that do not themselves receive federal aid.

III. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

The multiple conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the importance of the basic question presented: whether Title IX reaches private entities that do not themselves receive federal financial assistance, but receive payments from entities that do. This question is exceptionally important solely as it pertains to the NCAA, the organization charged with the "critical role" of regulating intercollegiate athletics in this country, a "revered tradition" of our national cultural heritage. *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 120. Indeed, in the Court of Appeals below nineteen separate amicus groups appeared solely to brief the important question "whether the [NCAA] * * * is subject to the requirements of [Title IX]." Amici Br. 1.

The Third Circuit ruling has immediate and serious practical implications for the NCAA. As those in Congress have recognized, "when we expand Federal jurisdiction under [the program-specific statutes], we expand the burdens accompanying them—paperwork, on-site compliance reviews, affirmative action requirements and much more." 134 Cong. Rec. S2396 (Mar. 17, 1988) (Sen Hatch); *see id.* at S2402 (Department of Justice letter listing administrative requirements).[14] More important, subjecting the NCAA to Title IX may impede the NCAA's efforts in fulfilling its vital mission. In this regard, Justice Powell's admonition in *Cannon* about the adverse effects of extending Title IX beyond its intended scope is apt here, too—"[a]rming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs," and impose upon institutions the "burden of expensive, vexatious litigation." 441 U.S. at 747 (dissenting). Requiring the NCAA to expend the time and resources necessary to defend against similar litigation by disgruntled student-athletes is especially inappropriate in light of the abundance of evidence—including this Court's interpretation in *Paralyzed Veterans*—that Congress never intended Title IX to apply to entities such as the NCAA that are not in fact recipients of federal funds.

But the implications of the Third Circuit decision are not limited to the NCAA. The court's indirect beneficiary analysis readily subjects countless other member organizations—national, state, and local—to claims that they, too, are subject to the program-specific statutes because these organizations, like the NCAA, receive dues or payments from members which, in turn, may receive federal funds. That is certainly true with respect to the scores of athletic associations and conferences (in addition to the NCAA), which operate at the high school and college levels throughout the country and receive dues or other payments from their member institutions. Moreover, the Third Circuit decision extends the program-specific statutes to virtually *any* individual or entity that receives nominal payments from—and, thus, under the Third Circuit rationale, "benefits from"—a college or university that, in turn, receives

[14] For example, the Title IX regulations require each recipient of federal financial assistance to designate an employee responsible for ensuring compliance with Title IX, and to notify students and employees of that individual's name, office address, and telephone number. 34 C.F.R. § 106.8. The NCAA has never designated such an employee, or been asked to do so. The regulations also impose upon recipients of federal financial assistance certain recordkeeping and reporting requirements, which the NCAA has never complied with, or been asked to comply with. *See id.* § 106.71 (incorporating by reference *id.* § 100.6). Regardless of whether Smith's Title IX claim has any merit (which it does not), the NCAA, which operates nationwide, now faces the prospect of having to comply with Title IX's regulatory regime simply due to the Third Circuit ruling in this case that it is covered by Title IX.

federal funds, all the way to the manufacturer of the basketball used to decide the intramural championship and the officials hired to referee the game. Once coverage is extended beyond the actual (or intended) recipients of federal aid there is simply no logical stopping point.[15]

In *Paralyzed Veterans* this Court conclusively rejected a similarly far-reaching interpretation of the identical federal-funding trigger at issue here, explaining that such an interpretation would give the program-specific statutes—including Title IX—"almost limitless coverage," a "result Congress surely did not intend." 477 U.S. at 608-609. This Court's subsequent decisions—including *Lago Vista* —only solidify that conclusion. The Court should grant certiorari to review the "almost limitless" interpretation of the federal-funding trigger adopted by the Court of Appeals below, extending Title IX to the private defendant in this case in direct conflict not only with the clear intent of Congress, but with this Court's decision in *Paralyzed Veterans*, as well as with the decisions of other federal circuits heeding the lesson of *Paralyzed Veterans*.

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[15] The prospect of such claims is not far-fetched. In one recent case, for example, a high school student brought a Title IX claim against her teacher. It was undisputed that the high school did not itself receive federal funding, but the district to which it belonged did (and therefore was subject to Title IX). To establish coverage under Title IX, the plaintiff argued that, since the district employed a psychologist who worked at the high school, the high school was an indirect beneficiary of the federal aid received by the district, and thus subject to Title IX. *Buckley* v. *Archdiocese of Rockville Ctr.*, 992 F. Supp. 586, 588 (E.D.N.Y. 1998). Relying in part on the District Court decision in this case "that the NCAA's relationship to federal funding was too 'attenuated' to justify subjecting it to Title IX," the court in *Buckley* dismissed the Title IX claim. *Id.* at 589 (quoting App. 32a). The Third Circuit decision breathes new life into such indirect beneficiary claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 97-3346, 97-3347

R.M. SMITH

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

RENEE M. SMITH,

Appellant.

Argued Feb. 12, 1998
Decided March 16, 1998

Before: GREENBERG, NYGAARD and McKEE, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Renee M. Smith, a pro se litigant, appeals from the district court's order of May 21, 1997, dismissing her complaint for failure to state a claim, and from the district court's order of June 5, 1997, denying her motion for leave to amend her complaint. Smith's complaint alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and Title IX of the Educational Amendments of 1972, 20

U.S.C. § 1681, as well as a state law breach of contract claim against the National Collegiate Athletic Association ("NCAA"). Smith's allegations arise from NCAA's promulgation and enforcement of a bylaw prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution.

The district court had jurisdiction over the federal claims in this matter pursuant to 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15, and over the state law claim pursuant to 28 U.S.C. § 1367. This court has jurisdiction to review the final orders of the district court pursuant to 28 U.S.C. § 1291.[1] We exercise plenary review over the district court's dismissal of Smith's complaint for failure to state a claim. *See Lake v. Arnold*, 112 F.3d at 682,

[1] According to the NCAA rules, a student-athlete is eligible to participate in intercollegiate athletics for a total of four seasons within a five-year period. Because Smith's five year-period of eligibility has expired and, according to the NCAA her complaint seeks only declaratory relief, the NCAA concludes that her Title IX claim is moot. We disagree.

Smith's Title IX claim is not moot although her period of eligibility has expired because she retains a claim for damages. *See Elis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442, 104 S.Ct. 1883, 1889, 80 L.Ed.2d 428 (1984) (holding that a claim is not moot where there is a viable damages claim); *National Iranian Oil Co. v. Mapco Intern., Inc.*, 983 F.2d 485, 489 (3d Cir. 1992); *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 41 (3d Cir.1985). Although count II of Smith's complaint, which asserts a Title IX claim, states that "[t]his action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA . . . in violation of Title IX," her complaint also includes a clause which prays for additional relief including damages and any further relief which the court finds appropriate. App. at 5. In our view, a fair reading of the complaint establishes that it asserts an action for damages under Title IX. *See Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (holding that a claim for damages exists in an action to enforce Title IX).

684 (3d Cir.1997). We accept all of her allegations as true, view them in the light most favorable to her, and will affirm the dismissal only if she can prove no set of facts entitling her to relief. *See Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996); *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir.1994). We review the district court's denial of her motion for leave to amend her complaint for abuse of discretion. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997).

II. FACTS AND PROCEDURAL HISTORY

Smith graduated from high school in the spring of 1991 and enrolled in St. Bonaventure University the following fall, where she participated in Division I athletics. Smith played intercollegiate volleyball for St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. By her choice, Smith did not participate in intercollegiate volleyball for St. Bonaventure during the 1993-94 season.

Smith graduated from St. Bonaventure in two and one half years. Thereafter, she enrolled in a postbaccalaureate program at Hofstra University, and then in 1995 she enrolled in a second postbaccalaureate program at the University of Pittsburgh. St. Bonaventure did not offer either of these postbaccalaureate programs.

The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. The member institutions agree to abide by and enforce these rules. The NCAA denied Smith eligibility to compete for Hofstra and the University of Pittsburgh in the 1994-95 and 1995-96 athletic seasons, respectively, based upon Bylaw 14.1.8.2 in the NCAA Manual (the "Postbaccalaureate Bylaw"). The Postbaccalaureate Bylaw provides that a student-athlete may not participate in intercollegiate ath-

letics at a postgraduate institution other than the institution from which the student earned her undergraduate degree.[2] Both Hofstra and the University of Pittsburgh applied to the NCAA for a waiver of the bylaw with respect to Smith, but the NCAA denied both requests. Smith was, however, in good academic standing and in compliance with all other NCAA eligibility requirements for the 1994-95 and 1995-96 athletic seasons.

In August 1996, Smith instituted this suit challenging the NCAA's enforcement of the bylaw as well as the NCAA's refusal to waive the bylaw in her case. More particularly, Smith alleged that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of section 1 of the Sherman Act and the NCAA's refusal to waive the bylaw excluded her from intercollegiate competition based upon her sex in violation of Title IX. Smith also asserted a state law breach of contract claim based upon the NCAA's denial of eligibility. On May 21, 1997, the district court dismissed Smith's federal claims for failure to state a claim upon which relief could be granted. The court held that the NCAA's refusal to waive the bylaw was not the type of action to which the Sherman Act applied. It also held that Smith's complaint did not

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[2] The bylaw at issue provides that

> [a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period. . . .

Rule 14.1.8.2 of NCAA Manual.

allege adequately that the NCAA was a recipient of federal funding so as to be subject to Title IX. By the same order, the district court exercised its discretion to dismiss Smith's state law contract claim pursuant to 28 U.S.C. § 1367(c). *See Smith v. National Collegiate Athletic Ass'n*, 978 F.Supp. 213 (W.D.Pa.1997).

Thereafter, Smith submitted a proposed amended complaint and moved the district court for leave to amend her complaint, which the district court denied "as moot" on June 5, 1997. Smith filed timely appeals from these orders, which we have consolidated.

III. DISCUSSION

A. Sherman Act Claim

Count I of Smith's complaint alleges that the NCAA, in promulgating and enforcing the Postbaccalaureate Bylaw, violated section 1 of the Sherman Act because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect. As we have indicated, the district court dismissed this claim for failure to state a claim upon which relief could be granted, holding that "the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied." *See Smith*, 978 F.Supp. at 218. Smith argues that the district court erred in limiting the application of the Sherman Act to the NCAA's commercial and business activities. We disagree.

Section 1 of the Sherman Act provides, in relevant part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although the section literally prohibits "every" contract, section 1 does not preclude all restraints on trade, but only those

that are unreasonable. *See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 & n.17, 104 S.Ct. 2948, 2959 & n. 17, 82 L.Ed.2d 70 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-44, 102 S.Ct. 2466, 2472-73, 73 L.Ed.2d 48 (1982). The Clayton Act, 15 U.S.C. §§ 15, 26, grants a private right of action to, *inter alia*, a person "injured in his business or property" by a violation of section 1 of the Sherman Act.[3]

Smith misconstrues the law in arguing that the Supreme Court has refused to limit antitrust remedies to commercial interests. The cases she cites address whether the plaintiffs alleged injuries within the meaning of the Clayton Act; in that context, the Court held that the statute was not limited to redressing injuries to commercial interests. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39, 99 S.Ct. 2326, 2330-31, 60 L.Ed.2d 931 (1979) (holding that "injury to business or property" was not limited to commercial interests); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473, 102 S.Ct. 2540, 2545, 73 L.Ed.2d 149 (1982) (holding that a subscriber to a health plan who had employed the services of a psychologist alleged a redressable antitrust injury); *see also McNulty v. Borden, Inc.*, 474 F.Supp. 1111, 1115-18 (E.D.Pa.1979) (holding that an employee of an alleged antitrust violator was injured in his business or property). The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities. Thus,

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[3] Section 4 of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

rather than focus on Smith's alleged injuries, we consider the character of the NCAA's activities.

In this regard, we recognize that the Supreme Court has suggested that antitrust laws are limited in their application to commercial and business endeavors. Thus, the Court has explained that

> [the Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The Court also has noted that "in *Apex* [it] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n. 7, 79 S.Ct. 705, 710 n. 7, 3 L.Ed.2d 741 (1959).

The Supreme Court addressed the applicability of the Sherman Act to the NCAA in *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70, holding that the NCAA's plan to restrict television coverage of intercollegiate football games violated section 1. The Court discussed the procompetitive nature of the NCAA's activities such as establishing eligibility requirements as opposed to the anticompetitive

nature of the television plan. *See id.* at 117, 104 S.Ct. at 2969. Yet, while the Court distinguished the NCAA's television plan from its rule making, it did not comment directly on whether the Sherman Act would apply to the latter.

Although insofar as we are aware no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules, *cf. McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343 (5th Cir.1988) (assuming without deciding that the NCAA's eligibility rules were subject to antitrust scrutiny and holding that the "no-draft" and "no-agent" rules do not have an anticompetitive effect), many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements. *See Gaines v. National Collegiate Athletic Ass'n*, 746 F.Supp. 738, 744-46 (M.D.Tenn. 1990) (holding that antitrust law cannot be used to invalidate NCAA eligibility rules, but noting in dicta that the "no-agent" and "no-draft" rules have primarily procompetitive effects); *Jones v. National Collegiate Athletic Ass'n*, 392 F.Supp. 295, 303 (D.Mass.1975) (holding that antitrust law does not apply to NCAA eligibility rules); *College Athletic Placement Service, Inc. v. National Collegiate Athletic Ass'n*, 1975-1 Trade Cas. (CCH) ¶ 60,117, *available in* 1974 WL 998, *2, *3 (D.N.J. 1974) (holding that the NCAA's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of antitrust law), *aff'd*, 506 F.2d 1050 (3d Cir. 1974) (table).

We agree with these courts that the eligibility rules are not related to the NCAA's commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek

to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court's recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in "business and commercial transactions," *Apex*, 310 U.S. at 493, 60 S.Ct. at 992, and therefore has only limited applicability to organizations which have principally noncommercial objectives, *see Klor's, Inc.*, 359 U.S. at 214 n. 7, 79 S.Ct. at 710 n. 7, we find that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements.[4]

Moreover, even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act, we would affirm the district court's dismissal of this claim. The NCAA's eligibility requirements are not "plainly anticompetitive," *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978), and therefore are not per se unreasonable, *see National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 101, 104 S.Ct. at 2960 (refusing to apply per se rule to NCAA's television plan because the NCAA is involved in an industry where horizontal re-

[4] The recent decision of the Court of Appeals for the Tenth Circuit in *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir.1998), does not alter our result. At issue in *Law* was the NCAA's bylaw restricting entry-level coaches' annual compensation. The court held that although the restriction was a horizontal price restraint, which is usually per se invalid, the rule of reason applied because certain products, such as intercollegiate sports, require horizontal restraints in order to exist. *See id.* at 1017 (citing *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 100-01, 104 S.Ct. at 2959-60).

The bylaw at issue in *Law* concerned a restriction on the business activities of the institutions, whereas the Postbaccalaureate Bylaw does not. Because our analysis regarding the applicability of the Sherman Act focuses on the distinction between commercial and noncommercial activities, *Law* is inapposite. Further, because of the significant difference in the nature of the bylaw at issue in *Law* and the Postbaccalaureate Bylaw, the *Law* court's rule of reason analysis is not instructive here.

straints are necessary to the availability of the product); *McCormack*, 845 F.2d at 1343-44; *College Athletic Placement Service*, 1975-1 Trade Cas. (CCH) ¶ 60,117, *available in* 1974 WL 998, *3. Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason.

Under the "rule of reason" test, a court considers all relevant factors in determining a defendant's purpose in implementing the challenged restraint and the effect of the restraint on competition, *see Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367-68 (3d Cir.1996) (citing *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243-44, 62 L.Ed. 683 (1918)), and asks essentially whether the challenged rule promotes or hinders competition. *See McCormack*, 845 F.2d at 1344.

As noted above, the Supreme Court has recognized the procompetitive nature of many of the NCAA's restraints, including eligibility requirements. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. at 117, 104 S.Ct. at 2969. According to the Supreme Court,

> [w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules . . . must be agreed upon, and all restrain the manner in which institutions compete. . . . Thus, the NCAA plays a vital role in enabling [intercollegiate sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice . . . and hence can be viewed as procompetitive.

Id. at 101-02, 104 S.Ct. at 2960-61 (footnote omitted). In particular, the Court explained that "[i]t is reasonable

to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics" and suggested that rules establishing eligibility requirements of student-athletes were such controls, while rules limiting television broadcasts were not. *See id.* at 117, 104 S.Ct. at 2969.

While the parties have not cited any opinion addressing the particular bylaw at issue here, and we have found none, other courts have held that the NCAA's "no-draft" and "no-agent" rules, which disqualify a student-athlete from further intercollegiate competition if the student-athlete enters a professional draft or contacts an agent, are reasonable because they are procompetitive. *See McCormack*, 845 F.2d at 1343; *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1087-94 (7th Cir.1992) (holding that NCAA's "no-draft" and "no-agent" rules do not have an anticompetitive impact on a discernable market); *Gaines*, 746 F.Supp. at 746; *Jones*, 392 F.Supp. at 304 (noting in dicta that "any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals"); *see also Justice v. National Collegiate Athletic Ass'n*, 577 F.Supp. 356, 379 (D.Ariz.1983) (holding that NCAA sanctions such as rendering a college team ineligible for post-season play and for television appearances imposed for violations of rule against providing compensation to student-athletes did not violate antitrust law because sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. *See McCormack*, 845 F.2d at 1345. Likewise, the bylaw at issue here is a reasonable restraint which furthers the

NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. Clearly, the rule discourages institutions with graduate or professional schools from inducing undergraduates at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a post-baccalaureate basis. Likewise, the rule discourages undergraduates from forgoing participation in athletic programs on their own initiative to preserve eligibility on a post-baccalaureate basis at another institution. Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted.

B. Title IX Claim

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Intercollegiate athletics is an educational program or activity within the statute. *See* 20 U.S.C. § 1687; 34 C.F.R. § 106.41(a).[5] Thus, the NCAA is subject to Title IX pro-

[5] The statute defines "program or activity" as

> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or . . .
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance. . . .

20 U.S.C. § 1687. In addition, federal regulation in part provides that

> [n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

vided that it receives federal financial assistance within the meaning of section 1681(a).

Federal regulations define "recipient" as including

> any public or private agency, institution or organization, or other entity, or any other person, *to whom Federal financial assistance is extended directly or through another recipient* and which operates an educational program or activity *which receives or benefits* from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997) (emphasis added). The plain language of the statute and regulation is quite broad and encompasses indirect recipients of federal funds. *See Grove City College v. Bell*, 465 U.S. 555, 564, 104 S.Ct. 1211, 1216, 79 L.Ed.2d 516 (1984) (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college because the language of the section does not distinguish between direct and indirect receipt of federal funds).

The Court of Appeals for the Sixth Circuit addressed the applicability of Title IX to a state high school athletic association in *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir.1994). In *Horner*, the plaintiffs, female student-athletes, alleged that the association received dues from its member high schools, many of which receive federal funds, and that a state statute authorized the designation of the association as an agent of the state board of education. *See* Ky.Rev.Stat. Ann. § 156.070(1), (2). In that capacity, the association performed the board's statutory duties with respect to inter-

scholastic sports. The plaintiffs alleged that the association violated Title IX by sanctioning fewer sports for girls than boys and by refusing to sanction a particular sport for girls. The court held that the association would be subject to Title IX if the plaintiff could prove her allegations with respect to its functioning and financing. *See id.*

The district court attempted to distinguish *Horner* by noting that "even if the [NCAA] receives dues from member schools which receive federal funds, unlike the situation in Horner, there is no statutory connection between the parties such that the Defendant can be considered the 'agent' of its member institutions that receive federal financial assistance." *See Smith*, 978 F.Supp. at 220. Thus, according to the district court, the distinguishing characteristic here is the lack of statutory authority for the NCAA. We disagree. The NCAA acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules.

In its construction of section 504 of the Rehabilitation Act, which contains language identical to that of Title IX in 20 U.S.C. § 1681(a) regarding receipt of federal assistance,[6] the Supreme Court has indicated that Congress, as in Title IX, did not distinguish between direct and indirect financial assistance. *See United States Dep't of Transp. v.*

[6] The Rehabilitation Act states that

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance.*

29 U.S.C. § 794 (emphasis added).

Paralyzed Veterans of America, 477 U.S. 597, 606-07, 106 S.Ct. 2705, 2711-12, 91 L.Ed.2d 494 (1986) (citing *Grove City College*, 465 U.S. at 564, 104 S.Ct. at 1216 (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college)). The Court, however, drew a distinction between those entities which indirectly *benefit from* federal assistance and those that indirectly *receive* federal assistance, holding that only those the *receive* federal funds are within the statute. Thus, the Court rejected the argument that all commercial airlines are "recipients" of federal funds simply because airport operators receive federal funds which benefit the airlines in the form of runways, *inter alia*. *See id.* at 606, 106 S.Ct. at 2711. The Court defined "recipient" from a contractual perspective, limiting "recipients" of federal funds, and therefore the obligations of the act, to those who are in a position to decide whether to "receive" federal funds and thereby accept the concomitant obligations of the statute. *See id.*[7]

Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the *Paralyzed Veterans* Court's definition of "recipient" to Title IX in the circumstances here. In our view, the broad regulatory language under Title IX, which defines a recipient as an entity "which operates an educational program or activity which *receives or benefits*" from federal funds, 34 C.F.R. § 106.2(h) (1997) (emphasis added), requires that we reach a different result. Application of *Paralyzed Veter-*

[7] The Court noted that "Congress enters into an arrangement in the nature of a contract with the recipients of the [federal] funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." 477 U.S. at 605, 106 S.Ct. at 2711. The Court further noted that "[b]y limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." *Id.* at 606, 106 S.Ct. at 2711.

ans here would render the regulatory definition of "recipient" under Title IX a nullity. After all, unlike the commercial airlines in *Paralyzed Veterans*, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary, it seems to us that the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for we think that it would be unreasonable to characterize the latter as surrogates for the airlines. Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its members which receive federal funds, if proven, would subject the NCAA to the requirements of Title IX.

The district court found that Smith's original complaint did not allege that the NCAA was a recipient of federal funds, and therefore dismissed the Title IX claim. *See Smith*, 978 F.Supp. at 219. Smith's complaint included the following allegation:

> This action is a request for declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

Compl. ¶ 25. We agree that Smith's original complaint did not contain an allegation that the NCAA receives federal financial assistance. Thus, the district court properly dismissed her original Title IX complaint.[8]

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[8] However, Judge McKee would hold that Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints. *See Zilich v. Lucht*, 981 F.2d 694 (3d Cir.1992) ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.").

But we have not confined our analysis to Smith's original complaint for, as we have indicated, following the district court's dismissal of her claims, Smith moved for leave to amend her complaint pursuant to Fed.R.Civ.P. 15. By order dated June 5, 1997, the district court denied this motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997." App. at 117. Because the district court gave no further explanation, it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded. Nevertheless, under either view, the district court erred in denying Smith's motion for leave to amend.

Pursuant to Fed.R.Civ.P. 15(a), a plaintiff has an absolute right to amend her complaint once at any time before a responsive pleading is served. Thereafter, a plaintiff must seek leave of the district court to amend her pleading, and although it is within the district court's discretion, district courts should grant such requests freely when justice so requires. *Id.*

After the district court enters judgment on a motion to dismiss, a plaintiff no longer may amend her complaint as of right. *See Newark Branch, NAACP v. Town of Harrison*, 907 F.2d 1408, 1417 (3d Cir.1990); *Kauffman v. Moss*, 420 F.2d 1270, 1276 (3d Cir.1970). However, even though Smith no longer was entitled to amend her complaint as of right after the dismissal of her claim, it was within the district court's discretion to grant her leave to amend. *See Newark Branch, NAACP*, 907 F.2d at 1417; *Kauffman*, 420 F.2d at 1276; *In re Sverica Acquisition Corp.*, 179 B.R. 457, 459 (Bkrtcy. E.D.Pa.1995); *Fearon v. Community Fed. Sav. & Loan of Phila.*, 119 F.R.D. 13, 15 (E.D.Pa.1988) (plaintiff had no right to amend where both complaint and action dismissed, but could seek leave of court to do so). Thus, her motion to

amend was not moot in the sense of being too late or being foreclosed by the dismissal.

While "the grant or denial of an opportunity to amend is within the discretion of the District Court . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). On the other hand, a district court justifiably may deny leave to amend on grounds such as undue delay, bad faith, dilatory motive, and prejudice, as well as on the ground that an amendment would be futile. *See id.; In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.1983). An amendment is futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim upon which relief could be granted. *See In re Burlington Coat Factory*, 114 F.3d at 1434 (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir.1996)). In determining whether the amendment would be futile, the district court applies the same standard of legal sufficiency as under Fed.R. Civ.P. 12(b)(6). *See id.*

Smith alleged facts in her proposed amended complaint which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX. Her motion states that she intended the amended complaint to cure any allegational defects, and the proposed amended complaint includes an allegation that the NCAA is an indirect recipient of federal funds. In particular, her proposed amended complaint alleges that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." App. at

98. This allegation plainly alleges that the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

If a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion in denying a plaintiff leave to amend to include a legally sufficient allegation. *See Centifanti v. Nix*, 865 F.2d 1422, 1431 (3d Cir.1989) (holding that the district court, which erred in its conclusion that there was jurisdictional defect, abused its discretion in denying a plaintiff's motion for leave to amend his complaint because the proposed amendment would not cure the jurisdictional defect). Thus, if the district court denied Smith leave to amend because it viewed the proposed amendments as futile, it erred because the conclusion was based on an error of law. Furthermore, we see no basis to conclude that the district court justifiably could have denied the motion to amend on the grounds that Smith had acted in bad faith, with a dilatory motive, or had delayed unduly in bringing the motion or that granting the motion would prejudice the NCAA. Indeed, there is nothing in the record to support a conclusion that the district court denied the motion to amend on any of these grounds. Overall, therefore, we are satisfied that the district court abused its discretion in denying the motion to amend the complaint.[9]

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[9] We do not imply that we have any view of the merits of Smith's Title IX claim. The parties have not briefed the merits, and the district court will address those issues on remand if Smith can prove her allegations to support the applicability of Title IX to the NCAA. Thus, we emphasize that we merely hold that the amendment would not have been futile in the sense that it would not have pled adequately that the NCAA was subject to Title IX.

IV. CONCLUSION

For the foregoing reasons, we will affirm the district court's dismissal of appellant's Sherman Act claim, vacate its dismissal of the Title IX claim, and reverse the district court's denial of her motion for leave to amend her complaint with respect to her Title IX claim. In light of this conclusion, we will remand to the district court for further proceedings consistent with this opinion and direct the district court to reinstate her state law contract claim, over which the district court declined to exercise jurisdiction pursuant to 28 U.S.C. § 1367(c). The parties will bear their own costs on this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. PENNSYLVANIA

Civil Action No. 96-1604

R. M. SMITH,
Plaintiff,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant.

May 21, 1997

OPINION AND ORDER OF COURT

AMBROSE, District Judge.

Pending before the Court is the Motion to Dismiss the Defendant, the National Collegiate Athletic Association ("NCAA"), to dismiss the complaint filed *pro* se by the Plaintiff, R.M. Smith ("Plaintiff" or "Smith") pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 12(b)(6). Plaintiff is alleging violation of section 1 of the Sherman Act, 15 U.S.C. § 1 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, as well as alleging a state law claim for breach of contract. For the reasons set forth below, Defendant NCAA's Motion to Dismiss will be granted.

STANDARD OF REVIEW

In deciding a motion to dismiss, all factual allegation and all reasonable inferences therefrom must be accepted

as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir.1988). A court may dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In ruling on a motion to dismiss for failure to state a claim, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666. Further, courts construe *pro se* complaints, such as the ones *sub judice*, more liberally than complaints drafted by lawyers and grant dismissal of *pro se* complaints only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972).

FACTS

The Plaintiff has alleged the following in her Complaint which, for purposes of this motion to dismiss I will accept as true. Plaintiff graduated from high school in 1991, became a member of the intercollegiate volleyball team at St. Bonaventure University in the fall of 1991 and played volleyball at St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. As a student-athlete, Plaintiff participated in intercollegiate events in multiple states within the United States. While participating in these intercollegiate events throughout the United States, Plaintiff as a student-athlete received awards, benefits and expenses permitted under Article 16 of the NCAA Manual. Plaintiff did not, at her own election, participate in an intercollegiate sport at St. Bonaventure during the 1993-94 athletic season.

After graduating from St. Bonaventure, Plaintiff entered a Postbaccalaureate Program at Hofstra University, where

Defendant NCAA denied eligibility to Plaintiff to participate in intercollegiate athletics during the 1994-95 athletic season. In 1995, Plaintiff entered into a second Postbaccalaureate Program at the University of Pittsburgh and again was denied eligibility by Defendant NCAA to play intercollegiate volleyball. Neither of the Postbaccalaureate programs entered into by Plaintiff were offered at St. Bonaventure, Plaintiff's undergraduate institution.

The basis for Defendant's denial to Plaintiff of eligibility to play intercollegiate sports during the 1994-95 and 1995-96 athletic seasons was its Postbaccalaureate Bylaw. The Postbaccalaureate Bylaw is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and prohibits a student-athlete from participating in intercollegiate athletics at a post-graduate institution other than the one from which his or her undergraduate degree was obtained. Plaintiff otherwise was in good academic standing and in compliance wth all other requirements to participate in intercollegiate athletics during the 1994-95 and 1995-96 athletic seasons. Both Hofstra University and the University of Pittsburgh appealed to the NCAA to waive the Postbaccalaureate Bylaw for Plaintiff but Defendant refused to waive the Bylaw with respect to Plaintiff and therefore, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons.

Graduates from two-year colleges are eligible to compete at other Division I institutions.

LEGAL ANALYSIS

I. *Plaintiff's Sherman Act Claim.*

At issue with respect to Plaintiff's Sherman Act claim is the Defendant's Postbaccalaureate Bylaw, which is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and which prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which his or her undergraduate degree

was obtained. Plaintiff has alleged in her Complaint that: (1) Defendant violated § 1 of the Sherman Act in that it engaged in a contract, combination, and conspiracy to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states; (2) the creation and enforcement of Bylaws in the NCAA Manual are joint actions by the NCAA and its member institutions, including Hofstra University and the University of Pittsburgh; (3) the Defendant and member institutions contract, combine, and conspire to enforce the Bylaws in the NCAA Manual; (4) intercollegiate athletics are activities in or substantially affect interstate commerce; (5) Defendant denied Plaintiff intercollegiate athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (6) the NCAA's decision to deny Plaintiff athletic eligibility was solely based upon the Postbaccalaureate Bylaw, found at Bylaw 14.1.8.2 of the 1993-94 NCAA Manual; (7) Hofstra University and the University of Pittsburgh both appealed to the Defendant to waive the Postbaccalaureate Bylaw for Plaintiff but the Defendant refused; (8) as a direct result of the NCAA's refusal to waive the Postbaccalaureate Bylaw, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (9) by an unreasonable restraint of trade, Plaintiff was injured in her business and property by not being permitted to participate in intercollegiate athletics at Hofstra University and the University of Pittsburgh during the 1994-95 and 1995-96 athletic seasons; (10) the Defendant's enforcement of the Postbaccalaureate Bylaw has an adverse anticompetitive effect, impairs and destroys competition and is unreasonable; and (11) enforcement of the Postbaccalaureate Bylaw cannot be justified by the NCAA especially when graduates from two-year colleges are eligible to compete at other Division I institutions. Complaint, ¶¶ 9-19.

Defendant first argues that Count I of Plaintiff's Complaint, which alleges that Defendant violated § 1 of the Sherman Act, must be dismissed for failure to state a claim

upon which relief can be granted. Specifically, Defendant asserts that said claim must be dismissed because "[t]he alleged unlawful activities are not of a 'commercial' nature and therefore do not fall within the purview of the Sherman Act," or alternatively, if the Sherman Act is applicable to the facts as alleged by Plaintiff, because "the enforcement of the NCAA Bylaws are reasonable, and therefore lawful, as a matter of law." Defendant's Motion to Dismiss, ¶¶ 6-7. Thus, the threshold inquiry is whether or not the Sherman Act is even applicable to the instant claim by Plaintiff.

Section 1 of the Sherman Act states in pertinent part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1. As explained by the United States Supreme Court in *Apex Hosiery Co. v. Leader et al.*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940):

> [The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 472-73, 60 S.Ct. at 985. The Court has further noted that "[t]he Court in *Apex* recognized that the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other

objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 n. 7, 79 S.Ct. 705, 710 n. 7, 3 L.Ed.2d 741 (1959). Plaintiff claims that Defendant violated § 1 of the Sherman Act in that through its Postbaccalaureate Bylaw, it "engaged, combined and conspired to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states." Complaint, ¶ 9.

While the question of whether the Sherman Act reaches the actions of the NCAA when, through the Postbaccalaureate Bylaw, it sets eligibility standards for postgraduate student-athletes in intercollegiate athletics, has never been addressed by the federal courts, the courts have examined the applicabilty of the Sherman Act in relation to other NCAA rules, regulations and plans. Thus, in *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the United States Supreme Court held that an NCAA plan that restricted the televising of the games of NCAA member institutions violated § 1 of the Sherman Act because it constituted a restraint upon the operation of a free market. To the contrary, in *Jones v. National Collegiate Athletic Association*, 392 F.Supp. 295 (D.Ma. 1975) and *Gaines v. National Collegiate Athletic Association*, 746 F.Supp. 738 (M.D.Tn.1990), district courts held that the Sherman Act does not reach the actions of the NCAA in setting eligibility standards where NCAA eligibility rules barred student-athletes at their member institutions from participating in intercollegiate sports after (1) a student-athlete had played multiple seasons with various "amateur" teams, receiving compensation therefore (*Jones*) and (2) a student-athlete had entered the National Football League draft (*Gaines*).[1] Notably, in so holding, the *Jones* court explained:

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[1] Like Plaintiff in the case *sub judice*, the plaintiff in *Jones* had alleged that his exclusion from participation in college sports reduced competition and thereby violated § 1 of the Sherman Act. In *Gaines*, the plaintiff argued that the defendants, by preventing college football players like himself from returning to college play for which they are otherwise eligible after an unsuccessful bid in the NFL draft, engaged in an unlawful exercise of monopoly power in violation of § 2 of the Sherman Act.

> [t]he plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws. The 'competition' which the plaintiff seeks to protect does not originate in the marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university. And, of equal significance, plaintiff has so far not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.

Id. at 303. Similarly, in *College Athletic Placement Service, Inc. v. National Collegiate Athletic Association*, 1974 WL 998, (D.N.J. August 22, 1974), *aff'd*, 506 F.2d 1050 (3d Cir.1974), the United States District Court for the District of New Jersey held that "[t]he NCAA's action in ratifying an amendment to its Constitution for the purpose of preserving educational standards in its member institutions does not come within the purview of the Sherman Act." *Id.* at *4. In *College Athletic Placement Service, Inc.*, the provision at issue forbade eligibility to student-athletes who agreed or had agreed to be represented by an agent or other marketing organization. Additionally, the United States Supreme Court has stated with respect to NCAA regulations and the Sherman Act that "[t]he specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, *the eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Board of Regents*, 468 U.S. at 117, 104 S.Ct. at 2969 (emphasis added). *But see Banks v. NCAA*, 746 F.Supp. 850, 857 (N.D.Ind.1990) ("[t]he

Supreme Court cited *Jones* with apparent approval in *NCAA v. Board of Regents*, 4[68] U.S. at 102, n. 24, 104 S.Ct. at 2961 n. 24. Nonetheless, after a careful reading of *NCAA v. Board of Regents*, this court is unwilling to rely on a single district court opinion [*Jones*] for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility.").

Thus, based upon a reading of the relevant case law, it is clear that the Sherman Act is applicable to the NCAA with respect to those actions of the Defendant that are related to its commercial or business activities, but only to those such activities. *See also Justice v. National Collegiate Athletic Association*, 577 F.Supp. 356, 383 (D.Ariz. 1983) ("[i]n sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.").

Having so found, after careful consideration of the submissions of the parties and the case law on this issue, I can only conclude that the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied. In other words, there is simply no logical way to conclude (through enforcement of the Postbaccalaureate Bylaw) that the NCAA is attempting to provide itself and its member institutions with a commercial advantage or that the result of the implementation of the Postbaccalaureate Bylaw is to provide the NCAA and its member institutions with any commercial advantage. Accordingly, Defendant's Motion to Dismiss Count I of Plaintiff's Complaint is granted for failure to state a claim upon which relief can be granted and Count I of Plaintiff's Complaint is dismissed.

II. *Plaintiff's Title IX Claim.*

Count II of Plaintiff's claim alleges that Defendant has violated Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, in that it has granted a disproportionate number of waivers of its Bylaws to male student-athletes. Defendant moves to dismiss this claim on the basis that (1) Plaintiff has failed to allege that Defendant is a recipient of federal financial assistance and (2) Plaintiff cannot establish that it is a recipient of federal financial assistance which would render it subject to Title IX.[2]

In response, Plaintiff does not address Defendant's first argument, that she failed to plead that Defendant is a recipient of federal funding. Rather, Plaintiff focuses upon the second argument raised by Defendant, namely that Plaintiff cannot establish that Defendant is a recipient of federal funding. Specifically, Plaintiff argues that:

> in the instant case, the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity. Further, the defendant benefits greatly when students receive financial aid. If such funds were not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student-athletes's income limitations. Possibly, financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of

[2] Defendant also argues that Plaintiff can offer no facts to support her conclusory allegation that the NCAA has engaged in sexual discrimination by granting more waivers of its Postbaccalaureate Bylaws to male student-athletes than female student athletes. This basis for dismissal of Count II is not, however, pled in its motion to dismiss and therefore, will not be considered in addressing Defendant's motion to dismiss. Further, I also note that in deciding Defendant's motion to dismiss Plaintiff's Title IX claim, I have not considered any of the extraneous documentation attached to Defendant's motion to dismiss.

> federal financial aid for student-athletes. Further, although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.

Plaintiff's Opposition Brief, p. 6. Plaintiff further argues on this point that "[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of educational institutions to Title IX scrutiny." *Id.*

Defendant, in its Reply Brief in Support of Motion to Dismiss ("Defendant's Reply Brief") counters Plaintiff's contentions by arguing:

> [while] Plaintiff argues the NCAA indirectly receives federal aid by passing rules which govern the operation of intercollegiate athletics, she does not allege the NCAA receives federal funds to administer its programs or that the NCAA administers any federal funds in adopting rules which govern the operation of intercollegiate athletic events. Plaintiff simply strains an argument by attempting to stretch the definition of "recipient" to include the NCAA because its rules affect students who may receive federal aid and also participate in intercollegiate athletics. There simply is no legal basis to extend the definition beyond the purpose of Title IX, which is to prevent the use of federal resources to support gender discrimination in connection with these programs.
>
> * * * *
>
> Because Plaintiff does not claim the NCAA administers federal funds in any way, she cannot show the NCAA used federal funds to promote or support gender discrimination.

Defendant's Reply Brief, pp. 3-4.

Title IX states: "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination

under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Thus, Title IX prohibits sex discrimination under any education program or activity receiving federal funds. "Recipient" is defined as:

> any state or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution or organization, or other party, or any other person, to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997). As explained in *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578 (W.D.Pa.) *aff'd*, 7 F.3d 332 (3d Cir.1993), Title IX "was intended to prevent the use of federal resources to support gender discrimination." *Id.* at 584, *citing*, *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

Addressing first Defendant's argument that Plaintiff's Title IX claim must be dismissed because of Plaintiff's failure to allege that the NCAA is a recipient of federal funds, although Plaintiff is appearing *pro se* and accordingly, I must construe her Complaint more liberally than a complaint drafted by an attorney and grant dismissal of said Complaint only if it appears beyond doubt that she can prove no set of facts in support of her claim that would entitle her to relief, the fact remains that as pleaded, Plaintiff has not alleged that the NCAA is a "recipient" of federal funding. Absent such an allegation, I must conclude that she has failed to state a claim upon which relief can be granted and therefore, grant Defendant's Motion to Dismiss Count II of Plaintiff's Complaint.

Moreover, even assuming that I could infer from Plaintiff's Complaint that she had pleaded that Defendant was a recipient of federal funds based upon the "connections"

with federal funding listed in Plaintiff's Opposition Brief and discussed above, i.e. because the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity, because the NCAA benefits greatly when students receive financial aid in that were such funds not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student-athletes' income limitations, because possibly financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of federal financial aid for student-athletes, and because although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees, I still would be compelled to hold that Plaintiff has failed to state a claim under Title IX upon which relief can be granted in that said "connections" with federal funding simply are too far attenuated to qualify Defendant NCAA as a recipient of federal funds thus subjected to the mandates of Title IX.

Notably, in so holding, I emphasize that I find the case *sub judice* distinguishable from that of *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 272 (6th Cir.1994). In *Horner*, the United States Court of Appeals for the Sixth Circuit held that the Kentucky High School Athletic Assciation ("KHSAA"), a voluntary, self-managing, unincorporated association of public, private and parochial schools, was a recipient of federal funds and therefore, subject to Title IX, because: (1) pursuant to Kentucky statute, it was designated as the agent for another Defendant, the Kentucky State Board for Elementary and Secondary Education, which was subject to Title IX, in its function of managing interscholastic athletics and (2) it received dues from member schools which received federal funds. *Id.* at 272. Specifically, the court stated:

> [t]he most persuasive evidence of the KHSAA's status as a recipient is the fact that its functions are statutorily decreed to be those of the Board. The association is able to perform those functions because state law expressly permits the Board to designate an agent to manage interscholastic athletics. Ky.Rev.Stat.Ann. § 156.07(1), (2). This, in combination with the fact that KHSAA receives dues from member schools which do receive federal funds, indicates that the association qualifies as an 'agent' which indirectly receives federal funds as described in 34 C.F.R. § 106.2(h), and is thus subject to Title IX.

Id., citing, Grove City College v. Bell, 465 U.S. 555, 564-70, 104 S.Ct. 1211, 1216-20, 79 L.Ed.2d 516 (1984). In the instant case, even if the Defendant receives dues from member schools which receive federal funds, unlike the situation in *Horner*, there is no statutory connection between the parties such that the Defendant can be considered the "agent" of its member institutions that receive federal financial assistance.

Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's Complaint for failure to state a claim upon which relief can be granted is granted and Count II of Plaintiff's Complaint is dismissed.

III. *Plaintiff's Breach of Contract Claim.*

In Count III of her Complaint, Plaintiff has brought a state law claim for breach of contract. Specifically, Plaintiff alleges that she is the third-party beneficiary of agreements between the NCAA and member institutions to enforce the NCAA Constitution and Bylaws, agreements which were breached when Defendant denied athletic eligibility to Plaintiff thereby preventing her from receiving the benefits of the agreements. Defendant moves to dismiss Count III of Plaintiff's Complaint on multiple grounds, only one of which need be addressed at this juncture in the proceedings.

Jurisdiction over Count III of Plaintiff's Complaint is premised solely upon 28 U.S.C. § 1367. Complaint ¶ 30.

Section 1367(c) states that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if— . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In making the decision to decline to exercise jurisdiction under § 1367(c), the United States Court of Appeals for the Third Circuit instructs that I "should take into account generally accepted principles of 'judicial economy, convenience, and fairness to the litigants'." *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1284 (3d Cir.1993), *quoting, United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Given my above holdings dismissing Counts I and II of Plaintiff's Complaint, the claims in Plaintiff's Complaint over which I had original jurisdiction, and taking into account the generally accepted principles of judicial economy, convenience and fairness to the litigants, I see no reason, given the preliminary stage at which this action is presently postured, to retain jurisdiction over Plaintiff's state law breach of contract claim and thus, I hereby elect under § 1367(c) not to exercise supplemental jurisdiction over Plaintiff's state law claim contained in Count III. Accordingly, Defendant's Motion to Dismiss Count III of Plaintiff's Complaint as a matter of law is granted and Count III of Plaintiff's Complaint is dismissed.

ORDER OF COURT

AND NOW, this 21st day of May, 1997, after careful consideration of the submissions of the parties and for the reasons set forth In the Opinion accompanying this Order, it is hereby ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint (Docket #: 4) is GRANTED in its entirety.

It is further ORDERED that Plaintiff's pending Motion for Disqualification Due to Conflict of Interest (Docket #: 11) is DISMISSED as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

Case No.: 96-1604

Judge: Ambrose

R. M. SMITH,
Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant.

ORDER

This cause came to be heard on motion of Plaintiff to file her amended complaint, it is ordered that the plaintiff be, and is hereby given leave to:

1. File her amended complaint within five days from the date of this order;

2. Serve upon the defendant, NCAA, a copy of the amended complaint;

3. Make Hofstra University and the University of Pittsburgh additional defendants herein, and it appearing to the count that said defendants are proper parties;

4. Direct the issuance of service of process upon these two additional defendants;

5. Have the Court's Order granting defendant's Motion to Dismiss (Docket #4) be reviewed and modified accordingly; and

6. Reinstate the Plaintiff's pending Motion for Disqualification Due to Conflict of Interest (Docket #11).

June 5, 1997

ORDER

The Motion to Amend Complaint (Doc. No. 18) is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997.

By the Court:

/s/ Donetta W. Ambrose
DONETTA W. AMBROSE
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-3346 and 97-3347

R. M. SMITH
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
RENEE M. SMITH,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 96-01604)

Present: Greenberg, Nygaard and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued February 12, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 21, 1997 and the order entered June 6, 1997, be, and the same are hereby affirmed insofar as the dismissal of the Sherman Act claim, vacated insofar as the dismissal of the Title IX claim, reversed insofar as the denial of the motion for leave to amend the complaint

with respect to the Title IX claim, and the cause is remanded to the said District Court with direction to reinstate the state law contract claim and for further proceedings in accordance with the opinion of this Court. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ [ILLEGIBLE]
Clerk

Dated: March 16, 1998

APPENDIX E

[Received and Filed April 20, 1998]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 97-3346 and 97-3347

R.M. SMITH

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

RENEE M. SMITH,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 96-01604)

BEFORE: BECKER, *Chief Judge*, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges*

The petitions for rehearing filed by appellant Renee M. Smith, and appellee, National Collegiate Athletic Association, in the above captioned matter having been submitted to the judges who participated in the decision of this court

and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

BY THE COURT:

/s/ [Illegible]
Circuit Judge

Dated: Apr. 20, 1998

APPENDIX F

20 U.S.C. § 1681(a) provides:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and

principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such indi-

vidual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

29 U.S.C. § 794 provides:

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

42 U.S.C. § 2000d provides:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

34 C.F.R. § 100.6 provides:

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable

him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official

finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

34 C.F.R. § 106.2(h) (1986 and 1998) provides:

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.4(a) provides:

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

34 C.F.R. § 106.8 provides:

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

34 C.F.R. § 106.71 provides:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 CFR, part 101.